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JURISDICTIONAL STATEMENT

Mr. Rutter set forth his Jurisdictional Statement in his Substitute Brief filed with this Court, and relies on same herein.

POINTS RELIED ON

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STATEMENT OF FACTS

Mr. Rutter set forth his Statement of Facts in his Substitute Brief filed with this Court, and will rely on same herein. However, he wishes to add the following to said statement of facts.

As it concerns Deputy Helton's application for a search warrant, said warrant was sought in that the officers wished to reenter the home to take additional photographs and obtain a carpet sample. (Supp. Tr. 30:8-9). Deputy Helton testified that this warrant was sought because he believed that a search warrant was now necessary to justify a search of Mr. Rutter's home. (Supp. Tr. 29:21-25; 30:1-6).

Additionally, in the State's opening argument at trial, the State injected certain statements made by Mr. Rutter stating that he had to shoot Mr. Hinkle for fear of his own life. (Tr. 202:20-25). The State also advised the jury that a pool of blood and a bullet casing were found near a closet in the living room. (Tr. 197:19-21; 198:16-18). Lastly, the State closed its argument by stating that there was no answer that justifies Mr. Rutter's actions. (Tr. 202:20-25). In the first few minutes of Mr. Rutter's opening argument, Mr. Rutter responded to the State's assertions and stated that there was an answer; Mr. Rutter was acting in self-defense because there were weapons located in that closet. (Tr. 203:20-25; 204:1-15).

I. THE TRIAL COURT ERRED IN ADMITTING THE TRIAL TESTIMONY OF DEPUTY CHUCK HELTON AND DEPUTY BRIAN YOUNG REGARDING THE OBSERVATIONS MADE AND ADMITTING EVIDENCE SEIZED DURING THEIR WARRANTLESS SEARCH OF MR. RUTTER'S HOME, INCLUDING, BUT NOT LIMITED TO, THEIR EXAMINATION OF THE INTERIOR OF A CLOSET LOCATED IN SAID HOME WHERE THIS ILLEGAL SEARCH RESULTED IN THEIR CLAIMED OBSERVATION THAT NO WEAPONS WERE PRESENT IN THAT SAME CLOSET, IN THAT SAID WARRANTLESS SEARCH, EXAMINATION AND SEIZURE WAS ONLY CONDUCTED AFTER THE HOME WAS SECURED BY THE OFFICERS PRESENT AND NO EXCEPTION TO THE SEARCH WARRANT REQUIREMENT WAS APPLICABLE, AND THEREFORE THIS WARRANTLESS SEARCH AND THE OBSERVATIONS MADE THEREIN VIOLATED DEFENDANT'S RIGHTS PROVIDED BY THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 15 OF THE MISSOURI CONSTITUTION AND HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS PROVIDED IN THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION.

The first issue that Mr. Rutter presented to this Court is whether the trial court erred in admitting the testimony of Deputy Chuck Helton and Deputy Brian Young as it relates to items seized and areas searched, including the observations made in their search of a closet,

after Mr. Rutter's home was secured and no exigent circumstances were present. Respondent claims that no trial court error exists under several different theories, to-wit: (1) this issue was raised for the first time on appeal, (2) this claim is without merit because the search was lawful[1], (3) Mr. Rutter waived this claimed error in his opening argument and by his presentation of evidence, and (4) no plain error occurred because no manifest injustice is present. Mr. Rutter will respond to Respondent's claims in the same order as presented by Respondent.

1. This issue was not raised for the first time on appeal, but rather was preserved throughout all proceedings.

As and for Respondent's first claim that Mr. Rutter failed to preserve this issue for appeal because "it was not raised before the trial court." (Resp. Br. Pg. 13). Respondent, in support of his claim, states that Mr. Rutter's Motion to Suppress Evidence did not request the suppression of the officer's observations during the search of the closet in Mr. Rutter's home. (Resp. Br. Pg. 13). However, Respondent's entire argument focuses on the subset of the larger problem and complaint, to-wit: the search of the home, including the search of the closet.

Respondent also seems to ignore the provisions of Mr. Rutter's Motion to Suppress that addresses his complaint of the search in question. (L.F. 37). In fact, Mr. Rutter's motion was entitled "Motion to Suppress Evidence," and it requested suppression of "any and all

[1]Respondent's argument that Mr. Rutter's claim is without merit is discussed only in the terms of plain error as it is Respondent's contention that said claim was not preserved.

articles seized" during this search of Mr. Rutter's home. (L.F. 37). The term "article" is defined by *Black's Law Dictionary*, in part, as "[a] specification of distinct matters … requiring judicial action." The term "matter" is defined, in part, by *Black's Law Dictionary* as "facts material to issue … transaction, event, occurrence." Lastly, the term "evidence," according to *Black's Law Dictionary*, includes "[t]estimony, writings, material objects or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."

Mr. Rutter's Motion to Suppress Evidence, as and for its grounds, clearly raised the issue that "[t]he search and seizure was made without authority and without a search warrant." (L.F. 37). This Motion further provides that "[s]aid search and seizure, thus, violated Defendant's rights under Article I, Sections 10, 15, and 18(a) of the Missouri Constitution, and the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution." (L.F. 38). Thus, Mr. Rutter's complaint regarding the search of his home was brought to the Court's attention, and Respondent's claim that "[n]one of this has to do with officers' observations as to the closet in appellant's house" is misplaced and, quite frankly, short-sighted. (Resp. Br. Pg. 14). Further, Mr. Rutter submits that when terms such as "article," "item," "matter," and "evidence" are used in legal pleadings and in legal arguments before any Court, said terms should be construed and defined in accord with their controlling definitions.

Next, Respondent claims that "[t]he prosecutor was never given an opportunity to respond to this claim and present evidence specifically addressing it and the trial court was never given an opportunity to address it" is misleading and misplaced. (Resp. Br. Pg. 14).

Respondent conveniently fails to address the motion to suppress hearing where evidence was presented regarding this search of the home, both the State's arguments and Mr. Rutter's argument made in that regard, and the trial court's response thereto. (Supp. Tr. 25-60).

Moreover, after a review of the Motion to Suppress Evidence hearing, Mr. Rutter's cross-examination of the witnesses establishes that the primary issue ferreted out was the timing of the search, and the fact that this search occurred after exigent circumstances terminated. See (Supp. Tr. 37:15-16 asking "and again you made the search before you obtained a search warrant?"); (Supp. Tr. 38:1-6). It is undisputed that following the presentation of evidence argument was offered by both Mr. Rutter and the State concerning the search of Mr. Rutter's home following the securing of same. (Supp. Tr. 55:6-12; 56:24-25, 57:1-3). Thus, Respondent is clearly mistaken that the State did not have the opportunity to present evidence as to the legality of this search and is also mistaken that the State, as well as the trial court, was not given the opportunity to address Mr. Rutter's complaint.

Respondent further claims that Mr. Rutter failed to preserve this issue at trial and in his Motion for New Trial. (Resp. Br. Pg. 15). However, at trial, Mr. Rutter renewed his objection and incorporated by reference the issues and arguments raised at the Motion to Suppress Evidence hearing. (Tr. 313:1-18). At Mr. Rutter's request, his objection was "constitutionalized" and was continuing in nature "to each and every item seized prior to the search warrant being obtained." (Tr. 313:1-18). The term "item" is defined by *Merriam-Webster's Collegiate Dictionary* as a "separate piece of news or information." Additionally, *West's Legal Thesaurus and Dictionary* provides that the pertinent synonyms of "item"

include "feature … aspect, circumstance … subject, point, detail … consideration … [and] factor." It was only after this aforesaid objection at trial that the pertinent testimony concerning the search of the house was admitted. Mr. Rutter must be viewed as timely objecting at trial to the complained of search.

Next Respondent claims that it was not raised and preserved by Mr. Rutter in his Motion for New Trial. (Resp. Br. Pg. 15). Mr. Rutter directs this Court's attention to his Motion for New Trial wherein he preserved this issue by stating the following:

> It is virtually undisputed that certain law enforcement personnel entered Mr. Rutter's home without a warrant, authored and developed various diagrams, made measurements, and searched and seized property. It was only after the above events occurred did these same officers apply for a search warrant. Moreover, it was these same officers' testimony that, through and during this illegal search, that they did not find any weapons in the living room closet.

(L.F. 118). Once again, this issue was "constitutionalized" by Mr. Rutter. (L.F. 116-117). Once again, Respondent is in error in claiming that Mr. Rutter did not preserve this issue for appeal.

This Court in State v. Evenson, 35 S.W.3d 486, 491 (Mo. Ct. App. 2000), provided guidelines in preserving an issue for appeal. This Court held that in order to preserve an issue, the objection must be specific, and the issue raised on appeal must follow the same theory of

law. Id. As set forth above, Mr. Rutter complied with the requirements to preserve this issue for appeal.

Additionally, in the event that this Court is of the opinion that Mr. Rutter did not raise this issue in his formal Motion to Suppress Evidence, Mr. Rutter submits to this Court that the argument offered and the cross-examination had during the motion hearing results in an amendment of that pleading to conform to the evidence admitted at said hearing. It cannot be contested that the State is granted liberal discretion in amending an information or indictment to conform to the evidence presented at a trial. State v. Waller, 918 S.W.2d 927, 929 (Mo. Ct. App. 1996); V.A.M.R. 23.08 (1980). It also cannot be contested that, in the civil context, that Missouri Supreme Court Rule 55.33 (b) provides that pleadings may be amended to conform to the evidence presented. V.A.M.R. 55.33 (b) (1994) (providing that "[w]henissues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings"). Implied consent is deemed present when the opposing party does not object to the questioning or presentation of evidence. Kackley v. Burtrum, 947 S.W.2d 461, 465 (Mo. Ct. App. 1997).

At the motion hearing in question, the precise issue of the illegal search of Mr. Rutter's home and the timing thereof were the primary issues, and evidence was presented in that regard. Moreover, the State did not object to Mr. Rutter's cross-examination of the State's witnesses concerning their search of Mr. Rutter's home. Thus, even assuming that Mr. Rutter's Motion to Suppress Evidence did not raise this issue, said motion must be viewed as being amended to conform to the evidence presented at the hearing.

Respondent's claims that this issue is not preserved for appellate review is without merit, as Mr. Rutter raised the issue, objected at trial, and preserved same for appellate purposes, all in accord with Missouri case law, rules and statutes.[2] Mr. Rutter did preserve this issue for appellate review, and thus this Court should review this issue and determine whether there exists sufficient evidence to support the trial court=s finding. State v. Galicia, 973 S.W.2d 926, 930 (Mo. Ct. App. 1998). Moreover, Mr. Rutter submits to this Court that there is insufficient evidence to support the denial of his Motion to Suppress Evidence, and therefore this cause must be remanded to the trial court for the purpose of a new trial.

2. Mr. Rutter's claim possesses merit and, in fact, warrants reversal for new trial.

Next, Respondent claims, in the context of plain error, that Mr. Rutter's claims do not require reversal for new trial. It must be noted that Respondent's entire argument is premised under the notion that this Court should exercise, at best, plain error review. Thus, if this Court believes that Mr. Rutter preserved this issue, as it is evident from Mr. Rutter's response above herein, Respondent's entire plain review argument is inapplicable.

First, Mr. Rutter must bring to this Court's attention Respondent's claim that "[s]ome

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[2]It appears that Respondent makes repeated citations to the opinion rendered by the Southern District Court of Appeals in this matter. While Mr. Rutter believes that said citations are misplaced, he desires to bring to this Court's attention that said Court did find that this issue was preserved, and was reviewed under the appropriate standard of review as stated by Mr. Rutter.

non-police witnesses who had been in the house also testified about not seeing any guns or weapons in the house." (Resp. Br. Pg. 17). The cited to testimony of Mr. Dement was that while walking through the living room into the bathroom and back outside he did not see any weapons. (Tr. 252:11-14). As it concerns Respondent's citation to page 281, quite frankly, it does not appear that Jerry Mann was ever asked whether he observed any weapons on that particular page of the transcript. (Tr. 281:1-25).

Respondent claims that the exigent circumstances exception justifies the search and Respondent makes citation to State v. Tidwell, 888 S.W.2d 736, 741 (Mo. Ct. App. 1994), for the proposition that "[i]f officers enter an house because of an exigent circumstance, they may leave the house and re-enter it to seize items that were seen in plain view when they initially entered a house so long as there is no 'unwarranted delay in time' **and** is no expansion of the scope of the search." (Resp. Br. Pg. 18) (emphasis added). Mr. Rutter agrees with Respondent that any expansion of the scope of the search is unlawful where exigent circumstances were once present but terminated prior to the reentry.

Respondent then states in the same breath that "[w]hile Deputy Young's conduct of crawling around in the closet with a flashlight looking for bullet casings and other evidence [Mr. Rutter] had no expectation of privacy because it had already been viewed ... [and Deputy Young] merely saw what had already been seen." (Resp. Br. Pg. 19). Respondent's claim defeats all logic in that Deputy Young would not be looking and searching for evidence on his hands and knees with the aid of flashlight if this evidence was already in plain view and found.

Respondent also argues that the doctrine of inevitable discovery is applicable and thus

Mr. Rutter's argument does not possess merit. First and foremost, Respondent states that "Appellant attempts to shift the burden of proof on this issue to the State." (Resp. Br. Pg. 19). Mr. Rutter emphatically states to this Court that no attempt to shift the burden is made in that the burden rests squarely with the State and not with Mr. Rutter. See State v. Young, 991 S.W.2d 173, 177 (Mo. Ct. App. 1999) (stating "To invoke the inevitable discovery exception to the exclusionary rule, **the State must establish** by a preponderance of the evidence that (1) certain standard, proper, and predictable procedures would have been utilized in the case, and (2) those procedures inevitably would have led to discovery of the challenged evidence") (emphasis added).

Respondent argues that "the evidence in question would have been discovered through other lawful means in that a search warrant was obtained a few hours after the search." (Resp. Br. Pg. 19). However, nothing is offered from the record to support this assertion. In fact, Mr. Rutter brings to this Court's attention the evidence offered by the State at the Motion to Suppress hearing which demonstrates that the officers sought a search warrant, for the first time, because they believed it was **now necessary** for reentry, and not to justify their prior search

In Murray v. United States, 487 U.S. 533 (1988), the United States Supreme Court addressed the doctrine of inevitable discovery/independent source, and reversed the cause to the district court for clarification of its factual findings. Id. at 543. In that case, the officers entered a warehouse illegally, discovered marijuana and then made application for a search warrant. Id. at 535-536. In the application for the search warrant, however, no statement was

made to the Court as it concerns the unlawful entry. Id. at 543. The District Court's factual findings did not explicitly find that the agents would have sought a search warrant if the unlawful entry would not have been made. Id. at 543. The First Circuit Court of Appeals held that the search warrant would have been sought regardless of the unlawful entry, and thus made a finding of fact in that regard. Id. Ultimately, the United States remanded the cause to the district court to clarify the district court's findings, and stated that "it is the function of the District Court rather than the Court of Appeals to determine the facts, and we do not think the Court of Appeals' conclusions are supported by adequate findings." Id.

Mr. Rutter brings Murray to this Court's attention in that the applicability of inevitable discovery cannot be based upon speculation, but rather must be supported by the facts contained within the record. Mr. Rutter submits that there is no evidence before this Court that supports the proposition that a search warrant would have been sought as it concerns the search in question where the search warrant was only sought, and for the first time, because the officers desired to reenter the home.

3. Mr. Rutter's opening statement merely responded to the State's opening statement.

Respondent argues that Mr. Rutter waived his complaint by "telling the jury in his opening statement that he was going to present testimony on this subject, by testifying that there were guns in the closet, and by presenting other witnesses who testified that there were guns in the closet." (Resp. Br. Pg. 20). Mr. Rutter submits that he did not waive his complaint, but rather said arguments were made and evidence presented in response to issues and matters

first raised by the State.

First, as it concerns opening arguments, Respondent claims that Mr. Rutter waived the complaint made herein because of the statements made in opening argument. However, Mr. Rutter brings to this Court's attention the State's opening argument, which obviously was made prior to Mr. Rutter's. The State argues repeatedly about the blood pool located in the living room, (Tr. 197:19-21; 198:16-18), the location of a gun casing near this pool of blood which was near a closet. (Tr. 200:24-24; 201:1). The State's opening statement also included the direction in which the bullet traveled, indicating that the weapon was fired at an angle. (Tr. 201:9-10). Lastly, the following argument is offered by the State:

> [Joan Hinkle] confronted [Mr. Rutter] and when she demanded what had happened, the Defendant said something to the effect, he went crazy and I had to shoot him. And she'll tell you too, that she said why did you have to, and he didn't answer. And when you have heard all that evidence, I think you'll find too that there is no answer.

(Tr. 202:20-25).

In light of the State's argument, and within the first minutes of Mr. Rutter's opening argument, Mr. Rutter expounded on the State's opening argument, and responded to the State's argument concerning Mr. Rutter's statements; he acted in self-defense. (Tr. 203:20-25; 204:1-15). In fact, after a close review of Mr. Rutter's opening argument, said argument responds to the State's allegations made in its opening statement point-by-point rather than

injecting some new issue or issues. Thus, no waiver of his complaint is present where Mr. Rutter only responded to the statements and inferences made by the State in its opening argument. State v. Kelley, 953 S.W.2d 73, 84 (Mo. Ct. App. 1997); State v. Pierce, 932 S.W.2d 425, 431 (Mo. Ct. App. 1996)

In Kelley, the Defendant was found guilty of murder where the victim was his estranged wife. 953 S.W.2d at 77. The issue before the Court involved the admissibility of certain hearsay statements made by the victim concerning their separation and apparent threats made by the Defendant. Id. at 82. The Court ultimately reversed the Defendant's conviction due to the error in admitting this prejudicial testimony. Id. at 86.

In reversing the case, the Kelley Court stated:

> Under the doctrine of curative admissibility, "[w]here the defendant has injected an issue into the case [via inadmissible evidence], the State may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects." However, this doctrine has no applicability here because the State first injected the issue of the parties' estrangement and non-amicable separation.

Id. at 84. The Court further recognized that because the State first injected the issue the statements "did not qualify as rebuttal evidence, the statements remained inadmissible, and their admission only served to improperly bolster an inference negative to Defendant." Id. See

also State v. Weaver, 912 S.W.2d 499, 510 (Mo. 1995) (stating that "[u]nder [the] doctrine [of curative admissibility], the defendant must first have introduced evidence, even though it might be technically inadmissible evidence").

In the case before the Court, and like Kelley, the State first injected Mr. Rutter's statement that he was forced to fire his weapon in fear for his life. Again, it was the State that first injected the issue where the pool of blood and bullet casing were found. It was the State that injected the issue that there was no answer for Mr. Rutter's actions. It was only after these statements were made by the State did Mr. Rutter respond in by stating that Mr. Rutter was, in fact, acting in lawful self-defense.

Respondent relies upon State v. Skillicorn, 944 S.W.2d 877 (Mo. 1997) and State v. Borden, 605 S.W.2d 88 (Mo. 1980), for the proposition that waiver occurred. However, both cases are irrelevant to the Court's determination herein and are not controlling because in both the issues were first injected by the Defendant and not in response to the allegations made by the State.

In Skillicorn, the claimed pertinent issue before the Court was the admission of a medical examiner's testimony. 944 S.W.2d at 891. In that case, the Defendant argued in his opening statement that the Defendant believed that the victim would have been tied up and left in the woods rather than shot by a co-defendant. Id. The medical examiner testified that even if the victim would have been tied up, the victim would have died as a result of dehydration within eight (8) days, which was the amount of time that elapsed before the victim was found. Id. at 891-892. The Court held that the Defendant injected the issue of the Defendant's belief

that the victim would have been tied up, and thus the State was proper in rebutting this claimed assertion and the fact that even if the victim was tied up as believed by the Defendant, the victim would have otherwise died. Id. at 892.

However, in Mr. Rutter's case, and unlike Skillicorn, as set forth above, Mr. Rutter only responded to the State's assertions and negative inferences, but this response did not inject some new issue or issues. Moreover, in light of Kelley, an issue may be injected by a party either explicitly or by inference, with the same effect of opening the proverbial door occurring.

In State v. Borden, the issue before the Court involved the admission of a co-defendant's plea bargain. 605 S.W.2d at 90. In that case, the co-defendant entered into a plea bargain where if he provided complete and truthful testimony at the Defendant's trial, his charge would be reduced. Id. However, at the time of this witness' testimony, the plea had not yet occurred. Id. An important aspect of this issue that must be brought to this Court's attention is that the Defendant did not object to the admission of the terms of the plea bargain during voir dire, during the State's opening statement, and/or during the State's direct examination, and thus the standard of review employed was only that of plain error . Id.

In Borden, the Court held that no manifest injustice occurred because the issue only involved the witness' bias or personal interest and was offered only for impeachment, and not as guilt by association as argued by the Defendant. Id. at 90-91. The Court also stated that in light of the circumstances, the defense counsel's vigorous cross-examination, and the standard of review employed, that it was not error to admit this impeachment evidence in advance of

Defendant's cross-examination. Id.

Lastly, in a close review of Borden, it is clear that the Court believed that if the State would not have offered the terms of the plea bargain the Defendant certainly would have offered same. The same cannot be said in Mr. Rutter's case because if the State would have been barred from stating that no weapons were located in the closet, with this observation being made during an illegal search, Defendant's trial strategy and presentation of evidence would have been altered.

4. Manifest Injustice is irrelevant as it is not the proper standard of review.

Respondent argues that no manifest injustice is present and thus Mr. Rutter is entitled to no relief. (Resp. Br. Pg. 21). However, this entire argument is premised upon the faulty notion that Mr. Rutter did not preserve this issue. As set forth above, Mr. Rutter did, in fact, preserve this issue for review, and thus the manifest injustice/plain error review is inapplicable.

Therefore, in light of the foregoing, Mr. Rutter prays for an Order and Judgment of this Court reversing Mr. Rutter's convictions for Murder in the First Degree and Armed Criminal Action and remanding this case to the trial court for new trial.

II. THE TRIAL COURT ERRED IN REFUSING THE OFFER OF DR. TERRY MARTINEZ AS AN EXPERT AT TRIAL AND IN DECLARING HIM NOT AN EXPERT IN THE PRESENCE OF THE JURY IN THAT A PROPER FOUNDATION WAS LAID FOR THE PRESENTATION OF HIS EXPERT TESTIMONY AND FOR HIS RENDERING AN EXPERT OPINION IN THIS MATTER AND THEREFORE THE TRIAL COURT'S LIMITATION OF THIS EXPERT TESTIMONY AND THE TRIAL COURT'S REJECTION OF DR. MARTINEZ AS AN EXPERT RESULTED IN SUBSTANTIAL AND IRREPARABLE PREJUDICE TO MR. RUTTER'S ABILITY TO PRESENT HIS DEFENSE AND IMPAIRED HIS RIGHT TO A FAIR TRIAL GUARANTEED TO HIM BY THE UNITED STATES CONSTITUTION PURSUANT TO THE SIXTH AMENDMENT AND MISSOURI CONSTITUTION UNDER ARTICLE I, SECTION 18(A) AND HIS RIGHT TO DUE PROCESS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION.

The second issue Mr. Rutter presented to this Court is whether the trial court erred in refusing to accept Dr. Terry Martinez as an expert witness at trial, and the trial court's limitations placed on this testimony as to the specific effects of Butalbital. Respondent claims that there was no error, and that Mr. Rutter is entitled to no relief.

Respondent states that the trial court "did not refuse the offer of Dr. Martinez as an expert and declare that he was not an expert. Although the trial court rejected appellant's offer

of Dr. Martinez as an unlimited expert, it allowed him to testify as an expert on toxicology and pharmacology." (Resp. Br. Pg. 27) (Resp. Br. Pg. 25 stating that the trial court allowed Dr. Martinez to testify to matters within his expertise). However, Respondent fails to consider the precise objections made by the State that were sustained by the trial court. For example, one exchange at trial was as follows:

A: 6.3 micrograms per milliliter, that is correct. (Tr. 537:1-2).

Q: Okay, and is there a significance to that level? (Tr. 537:3-4).

A: Yes there is. (Tr. 537:5).

Q: And what would that be? (Tr. 537:6).

Objection: I'm going to object to that your honor, if he's not been accepted as an expert how can he draw a conclusion? (Tr. 537:7-9).

COURT: Objection is sustained. Would you rephrase your objection about the significance, it might be difficult of the doctor to answer about the significance. (Tr. 537:10-13).

The proceedings before the trial court demonstrate that Respondent's claim that Dr. Martinez was allowed to testify as an expert on toxicology and pharmacology is misplaced. If Dr. Martinez were allowed to testify as an expert in toxicology and pharmacology he would have been allowed to render his opinion concerning key elements of Mr. Rutter's case; the significance of 6.3 micrograms of Bultalbital, the side effects of same, Dr. Martinez's observations of behaviors of individuals with this level, and the effects of barbiturates.

Moreover, Respondent's argument that Dr. Martinez was only refused as an unlimited

expert is misplaced in that the only questions put to him by Mr. Rutter dealt directly with matters that rest within his expertise. Despite Respondent's contentions, the trial court's rulings and comments did not reject Dr. Martinez only as an "unlimited expert," as is claimed by Respondent, but rather, and as the State's objections and the trial court's rulings put in the proper context evidence the fact that he was not "accepted as an expert" to testify to matters well within his knowledge and expertise concerning Butalbital. Thus, this unlimited expert witness argument is without merit.

The Missouri Courts have recognized that the improper exclusion of expert testimony may violate due process, as a defendant has a fundamental right to present witnesses in his defense of the charges lodged against him. State v. Belcher, 856 S.W.2d 113, 116 (Mo. Ct. App. 1986); See also State v. Copeland, 928 S.W.2d 828, 837 (Mo. 1996) (recognizing that "[t]he denial of the opportunity to present relevant and competent evidence negating an essential element of the state's case may, in some cases, constitute a denial of due process"). Moreover, "[i]n a criminal case, error is presumed to be prejudicial … It will be considered prejudicial unless the reviewing court can declare beyond a reasonable doubt that it was not prejudicial to the fairness of defendant's trial. State v. Pisciotta, 968 S.W.2d 185, 189 (Mo. Ct. App. 1998) (internal citations omitted).

In fact, this Court has held, in addressing the exclusion of an expert witness' testimony at a criminal trial, that "[t]he fundamental purpose of a criminal trial is the fair ascertainment of the truth … The jury needed every bit of available evidence touching that issue in order to render an intelligent, fair and just verdict. Not only the defendant, but also the State of

Missouri, has a direct interest in an accurate, just and informed verdict based upon all available relevant and material evidence bearing on the question." State v. Carter, 641 S.W.2d 54, 58 (Mo. 1982). Thus, the rejection and/or limitations placed on Dr. Martinez precluded the full presentation of Mr. Rutter's defense by excluding "every bit" of evidence touching the issues presented in the present matter.

Respondent correctly states the controlling standard of review, which is abuse of discretion. However, in light of Dr. Martinez's expertise concerning this issue, Mr. Rutter submits that the trial court's error does, in fact, constitute an abuse of discretion. Moreover, in light of the trial court's rulings as set forth above, said rulings demonstrate that Dr. Martinez was not allowed to fully testify as an expert at trial to a core issue in Mr. Rutter's case.

Defendant submits that this standard of review, although still an abuse of discretion, is somewhat lessened due to Dr. Martinez's qualifications, Dr. Martinez's recognition as an expert witness and toxicologist (See also State v. Platt, 496 S.W.2d 878, 884 (Mo. Ct. App. 1973) (holding that toxicologist is properly qualified to testify about the specific effects of drugs on the human body)), and the State's presentation of both Dr. Christopher Long and Dr. Deideker's testimony about the specific effects of Butalbital. See State v. Knese, 985 S.W.2d 759, 768 (Mo. 1999) (quoting Skillicorn, 944 S.W.2d 877, 891 (Mo. 1997) quoting State v. Copeland, 928 S.W.2d 828, 837 (Mo. banc 1996) ("Because expert testimony is always fraught with questions of relevancy and competency, the decision to admit expert conclusions is a matter of trial court discretion that will not be overturned on appeal absent an abuse of discretion"). Mr. Rutter suggests that the relevancy of the specific effects of Butalbital is not

disputed and the qualifications of Dr. Martinez are not subject to real contest.

Next, Respondent claims that no prejudice occurred because the "gist" of Dr. Martinez's testimony was received by the Court. The cases cited by and relied on by Respondent for this proposition involve a completely different set of circumstances. In State v. Schneider, 736 S.W.2d 392, 401 (Mo. 1987), the limitations were placed by the trial court during cross-examination of a lay witness because of hearsay and where said examination primarily served only impeachment purposes. In State v. Gilmore, 681 S.W.2d 934, 940 (Mo. 1984), once again the limitations placed by the trial court involved cross-examination of a lay witness for impeachment and argumentative purposes. Gilmore, 681 S.W.2d at 940 (holding that "[a] trial court has broad discretion to disallow repetitive and harassing interrogation, to limit attacks on general credibility, and to preclude attempts to elicit irrelevant, collateral or stale matters").

However, in the present case, the limitations were placed on Mr. Rutter during his case-in-chief during the direct examination of his only expert witness, where said expert testimony was critical to his presentation of self-defense. The case at bar involves the preclusion of presenting evidence in his defense, while the authority relied upon by Respondent involves limiting argumentative and hearsay cross-examination.

Respondent further argues that "appellant cannot complain on appeal that the ruling occurred in the presence of the jury (without him objecting to that fact at trial) because it is appellant's fault that the ruling occurred then because appellant was in the presence of the jury when he asked for the witness to be declared an expert." (Resp. Br. Pg. 27). However, in

making this statement, Respondent fails to address the precise chronology of the events at trial. First, Mr. Rutter presented the trial court with Dr. Martinez's extensive qualifications, (Tr. 529-533), and then the State then requested to voir dire the witness. Following the voir dire, the State then made a general objection to the offer of Dr. Martinez, which was sustained by the trial court. (Tr. 535:24-25; 536:1).

During the direct examination of Dr. Martinez the State objected on numerous occasions stating that Dr. Martinez cannot render an expert conclusion. See (Tr. 537:7-9 stating "I'm going to object to that your Honor, if he's not been accepted as an expert how can he draw a conclusion"). The trial court would then would sustain the objection. See (Tr. 537:10). Mr. Rutter submits to this Court that the proceedings, and the chronology of same in the trial court demonstrate that he did not, in any manner, invite this error in that said error occurred through the actions of the State and the trial court.

Respondent also makes citation to State v. Phelps, 478 S.W.2d 304 (Mo. 1972) for the proposition that where rulings as to the admissibility of evidence are directed to the parties said rulings are not prejudicial. (Resp. Br. Pg. 28). However, in Phelps, the trial court's statement did not comment on whether the witness was qualified and thereby commenting on the weight to give said evidence, but rather accurately recounted the witness' testimony and her inconsistent statements. Id. at 310. The Court did not state that the witness was not qualified to testify, but rather recognized that she was subject to impeachment based upon the statements already contained within the record. Id. Unlike Phelps, in Mr. Rutter's case the trial court did, in fact, improperly comment on Dr. Martinez's qualifications in the presence of the jury, and

violated Mr. Rutter's right to a due process and a fair trial guaranteed by the United States Constitution and Missouri Constitution.

Therefore, Mr. Rutter prays for an Order of this Court reversing Mr. Rutter's convictions for Murder in the First Degree and Armed Criminal Action and remanding this cause to the trial court for a new trial.

V. THE TRIAL COURT ERRED IN NOT GRANTING MR. RUTTER'S MOTION FOR NEW TRIAL BASED UPON THE ADMITTED ERROR IN THE TESTIMONY OF TONY COLE IN THAT SAID TESTIMONY INVOLVED THE NEGATIVE IMPLICATION, WHICH WAS REPEATEDLY ARGUED BY THE STATE, THAT MR. RUTTER OBTAINED A PRESCRIPTION FOR BUTALBITAL IN THE NAME OF MR. RUTTER'S DECEASED RELATIVE IN THAT SAID TESTIMONY AND THE ARGUMENTS MADE THEREON SUBSTANTIALLY PREJUDICED MR. RUTTER'S RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW GUARANTEED BY THE UNITED STATES AND MISSOURI CONSTITUTIONS.

The next issue that Mr. Rutter presented to this Court was whether the trial court erred in refusing to grant Mr. Rutter's Motion for New Trial where said motion hearing included the testimony of Tony Cole admitting that his trial testimony was in error as it concerns whether Mr. Rutter obtained a prescription in a deceased relative's name. Respondent claims that Mr. Rutter is not entitled to relief because (1) this testimony was cumulative to other evidence before the jury, (2) it was only impeachment evidence, (3) appellant did not exercise due diligence and (4) the error was not material that it would produce a different result.

As and for the claim that this testimony was only cumulative, Mr. Rutter submits that this is incorrect. The testimony in question is that Tony Cole claimed that the Butalbital prescription was filled in Mr. Rutter's deceased relative's name. (Tr. 382:22-24). After a thorough review of the transcript, Mr. Rutter is unaware of any other witness claiming that Mr.

Rutter filled the prescription in this relative's name. While Mr. Rutter did present evidence that Mr. Cole's claim was not true, and thus evidence was in conflict, this does not create a situation where evidence is cumulative. Thus, Respondent's argument is without merit.

Next Respondent claims that this was merely impeachment evidence of Tony Cole. (Resp. Br. Pg. 35). However, this claim is incorrect in that, if it was impeachment evidence, it was used to impeach Mr. Rutter not Tony Cole. (Tr. 670:25; 671:1-2). Additionally, the State, in its closing arguments, stated that it was "suspicious" that Mr. Rutter was filling the prescription in his dead uncle's name where this prescription was for the same medication found in Mr. Hinkle's system. (Tr. 890:2-13). This error in testimony is not impeachment evidence against Mr. Cole, and thus Respondent's argument must fail.

Respondent argues that Mr. Rutter did not exercise due diligence and thus is entitled to no relief. Mr. Rutter did exercise due diligence in pursuing this issue, but due diligence cannot alter a witness' testimony if he or she believes it is correct at that time. In fact, it was Mr. Rutter's due diligence and questioning that led to Mr. Cole correcting the error in his testimony. (Tr. 926:1-10).

Lastly, Respondent claims that this error in testimony was not material because the result of the trial would not have changed if Mr. Cole were impeached with his testimony. (Resp. Br. Pg. 35). Mr. Rutter submits that this argument fails to recognize how this error in Mr. Cole's testimony was used by the State. First, Mr. Rutter was cross-examined as it concerns this prescription immediately after his testimony about the fight between Mr. Hinkle and Mr. Rutter in an attempt to prove that Mr. Rutter was being untruthful. (Tr. 670:25; 671:1-

2).

Mr. Rutter submits that the record before this Court refutes Respondent's claim that this issue is not material, especially in light of the manner it was used by the State at trial. In fact, Mr. Rutter submits that this issue was material and did effect the verdict where Mr. Rutter's veracity was challenged which thereby subjected Mr. Rutter's belief that he was about to die and acting in self-defense to additional challenge before the jury and ultimately resulted in his conviction for Murder in the First Degree and Armed Criminal Action.

Therefore, Mr. Rutter prays for an Order and Judgment reversing and setting aside his convictions and remanding this matter to the trial court for a new trial.

CONCLUSION

Wherefore, in light of the foregoing, Mr. Rutter prays that this Court enter an order reversing his convictions of Murder in the First Degree and Armed Criminal Action, and remanding this matter to the trial court for purposes of a new trial.

SIGNATURE BLOCK

The foregoing brief is respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27th day of August, 2002, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to Breck K. Burgess, Assistant Attorney General, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

The undersigned further hereby certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06, and the brief contains 7,481 words.

The undersigned also hereby certifies that the labeled disk, simultaneously filed with the hard copies of the brief, was scanned for viruses and is virus free.

Respectfully submitted,

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